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Attorneys at Law

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

September 9, 1997

**VIA HAND-DELIVERY**

William Kennard, Esquire  
General Counsel  
Federal Communications Commission  
Room 614, Mail Stop 1400  
1919 M Street, N.W.  
Washington, D.C. 20554

Re: James A. Kay, Jr., WT Docket No. 94-147

Dear Mr. Kennard:

This firm is counsel for James A. Kay, Jr. ("Kay") in the above-captioned matter. On February 5, 1997, we requested that the Managing Director investigate a possible violation of the Commission's *ex parte* rules by the Wireless Telecommunications Bureau ("Bureau") in conjunction with a proceeding styled Marc D. Sobel, WT Docket No. 97-56. In a letter dated April 28, 1997, the Managing Director concluded that no violation of the Commission's *ex parte* rules had occurred. Copies of our February 5, 1997 letter and the Managing Director's April 28, 1997 response are enclosed for your review.

This letter is to, again, request a copy of the Bureau's staff recommendation in the Sobel proceeding as well as any other communications from the Bureau to the Commission concerning Kay. In your April 28, 1997 letter, you admit that "[T]he staff recommendation contains references to James A. Kay . . . and notes the status of the adjudicatory proceeding." Given the relationship between Kay and Sobel and the fact that the Commission designated both licensees for hearing, we believe that our review of the staff recommendation in the Sobel proceeding and any other communications to the Commission concerning Kay is essential to our analysis of the underlying fairness of the above-captioned proceeding and should be produced. To the extent necessary, portions of the staff recommendation or any other communications from the Bureau to the Commission concerning Kay that are not related to Kay can be redacted.

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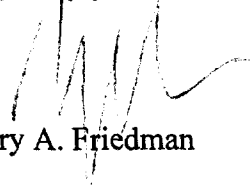
THOMPSON  
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*Attorneys at Law*

William Kennard, Esquire  
General Counsel  
Federal Communications Commission  
September 9, 1997  
Page 2

Thank you for your assistance. Please do not hesitate to call me with any questions.

Very truly yours,



Barry A. Friedman

Enclosures

cc: Mr. James A. Kay, Jr. (w/enclosures)  
Gary P. Schonman, Esquire (w/enclosures)  
W. Riley Hollingsworth, Esquire (w/enclosures)

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THOMPSON  
HINE & FLORY LLP

*Attorneys at Law*

February 5, 1997

VIA HAND-DELIVERY

Andrew S. Fishel  
Managing Director  
Federal Communications Commission  
Room 852  
1919 M Street, N.W.  
Washington, D.C. 20554

Re: James A. Kay, Jr., WT Docket No. 94-147

Dear Mr. Fishel:

This firm is counsel for James A. Kay, Jr. ("Kay") in the above-captioned matter. Kay has pending before the Commission an Application for Review of the Administrative Law Judge's decision in In the Matter of James A. Kay, Jr., 11 FCC Rcd 6585 (ALJ 1996).

We recently reviewed a copy of the FCC's Opposition to Petition for Writ of Mandamus filed by Marc D. Sobel d/b/a Air Wave Communications ("Sobel") in the United States Court of Appeals for the District of Columbia Circuit (Case No. 96-1361), a copy of which is attached hereto. The FCC's Opposition contains numerous references to Kay and Sobel's relationship with Kay and states that "the Commission currently has before it a staff recommendation for action directly responsive to Sobel's complaint." Given the similarities identified by the FCC between its pending case against Kay and Sobel's close relationship with Kay, the "staff recommendation" of the Wireless Telecommunications Bureau to the Commission must contain references to Kay and/or the pending proceeding involving Kay. Pursuant to Section 1.1214 of the Commission's Rules, we are advising you of our belief that the "staff recommendation" violated the Commission's ex parte rules (Section 1.1200, et seq. of the Commission's Rules), by virtue of the fact that these documents were not supplied to Kay at the same time they were delivered to "decision-making personnel" of the Commission.

Under these circumstances, we request a copy of the staff recommendation to the Commission and any other communications to the Commission concerning Kay and/or Sobel as well as a determination that the Wireless Telecommunications Bureau

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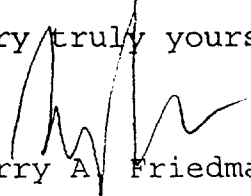
*Attorneys at Law*

Andrew S. Fishel  
Managing Director  
Federal Communications Commission  
February 5, 1997  
Page 2

violated the ex parte rules. We further request that if it is determined that the ex parte rules were violated, that appropriate sanctions be issued pursuant to the provisions of Section 1.1216 of the Commission's Rules.

Thank you for your assistance. Please do not hesitate to call me with any questions.

Very truly yours,



Barry A. Friedman

Enclosure

cc: James A. Kay, Jr. (w/enclosure)  
Gary P. Schonman, Esquire (w/enclosure)  
W. Riley Hollingsworth (w/enclosure)

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In The  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

*In re*

MARC D. SOBEL, d/b/a/ AIR WAVE  
COMMUNICATIONS,

Petitioner

No. 96-1361

**FCC OPPOSITION TO PETITION FOR WRIT OF MANDAMUS**

The Federal Communications Commission opposes the petition for writ of mandamus filed by petitioner in the captioned case. Petitioner Sobel seeks an order from the Court directing the FCC to act on a number of applications and other requests for action that he has filed with the FCC. As discussed below, this matter involves a complicated factual inquiry related to an ongoing hearing proceeding involving enforcement action against another party before the Commission, as well as an ongoing investigation of Sobel. In the circumstances, the time that the agency has devoted to pending matters involving petitioner is fully justified. Sobel has failed to meet the very high standard required of a party seeking the extraordinary remedy of mandamus. In any event, the Commission currently has before it a staff recommendation for action directly responsive to Sobel's complaint. We anticipate Commission action on the staff's recommendation soon.

**Background**

Petitioner Sobel holds a number of FCC land mobile radio station licenses, principally in the Specialized Mobile Radio Service (SMR) in the Los Angeles area. This service generally provides mobile radio services to businesses. Although the SMR service is used primarily for voice communications, including interconnection with the public switched telephone network, systems are also being developed for data and facsimile services. The development of a digital, rather than analog, SMR marketplace is allowing new features and

services, such as two-way acknowledgment paging, credit card authorization, automatic vehicle location, fleet management, inventory tracking, remote database access, and voice-mail. The growth of the SMR service has been significant due to these new developments.

Sobel has been the subject of an ongoing FCC investigation, particularly with respect to his relationship with another licensee in the Los Angeles area, James A. Kay, Jr. In a December 1994 order, the Commission commenced a hearing proceeding to order Kay to show cause why 164 land mobile licenses he held or controlled should not be revoked or cancelled, why he should not be ordered to cease and desist from certain violations of the Communications Act and why an order of forfeiture should not issue. See Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture: In the Matter of James A. Kay, Jr., 10 FCC Rcd 2062 (1994). At the time of this action, the Commission believed that because of Sobel's business relationships with Kay, some of Sobel's licenses were in fact controlled by Kay. Kay and Sobel denied any such relationship, and the Commission subsequently removed the disputed licenses from the Kay hearing in order to permit its staff to conduct a separate investigation of Sobel. See In the Matter of James A. Kay, Jr., 11 FCC Rcd 5324 (1996). In a June 11, 1996 letter, a copy of which is attached to Sobel's mandamus petition (Att. 9), the staff sought information from Sobel regarding his relationship with Kay. A staff recommendation for an agency order based on that investigation is now before the Commission.

In a May 1996 action, the presiding Administrative Law Judge in the Kay proceeding found Kay unqualified to be a Commission licensee, revoked all of his licenses and ordered Kay to forfeit \$75,000. In the Matter of James A. Kay, Jr., 11 FCC Rcd 6585 (ALJ 1996). Kay's application for review of that decision is currently pending before the Commission.

In the subject petition for writ of mandamus, Sobel complains of FCC delay on a

number of applications he has pending before the Commission and which have not been acted on during the pendency of the Kay hearing and the subsequent staff investigation of Sobel. Sobel acknowledges that he and James A. Kay are "friends and have a business relationship" and that "some" of the stations licensed to Sobel are in fact managed by Kay pursuant to a management agreement. Pet. at 3. As Sobel also correctly observes, management arrangements between licensees and others are not necessarily improper. Pet. at n.11.

### Argument

Relief in the nature of mandamus is a "drastic remedy," Will v. United States, 389 U.S. 90, 104 (1967), reserved for "really extraordinary causes." Ex parte Fahey, 322 U.S. 258, 260 (1947). At a minimum, a petitioner must show that its right to issuance of such a writ is "'clear and indisputable.'" Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988), quoting, Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 384 (1953), and United States v. Duell, 172 U.S. 576, 582 (1899). See also Air Line Pilots Ass'n v. DOT, 880 F.2d 491, 503 (D.C.Cir. 1989); In re Richard Thornburgh, 869 F.2d 1503, 1506-07 (D.C.Cir. 1989). Sobel's petition does not meet this very high standard -- indeed does not even discuss it. The petition fails to justify action by the Court directing the agency to re-order its priorities and place the particular matter in which Sobel is interested ahead of others that the agency has judged more important.

Whether the time an agency takes to complete a matter is so egregious as to warrant mandamus is governed by a "rule of reason." See MCI Communications Corp. v. FCC, 627 F.2d 322, 340 (D.C.Cir. 1980). Although the standards are not ironclad, what is reasonable is governed by such considerations as whether Congress has provided in the agency's enabling statute a timetable or other indication of the speed with which it expects the agency to proceed. In addition, the Court has held that delays that might be reasonable in the sphere

of economic regulation are less tolerable when human health and welfare are at stake. The Court has also held that in considering mandamus requests alleging unreasonable delay, courts should consider the effect of expediting action on agency activities of a higher or competing priority and should take into account the nature and extent of the interests prejudiced by delay. See generally Telecommunications Research & Action Center v. FCC, 750 F.2d 70, 79-80 (D.C.Cir. 1984); see also Action on Smoking and Health v. Department of Labor, 100 F.3d 991, 994-95 (D.C.Cir. 1996); Monroe Communications Corp. v. FCC, 840 F.2d 942, 945-46 (D.C.Cir. 1988).

The length of time that Sobel's applications have been pending before the Commission is not egregious under the circumstances, as claimed by the petition. Of the twelve matters about which Sobel complains, as set out in Attachment 2 to the petition, two date back to November and December 1993, six were filed in 1994 and the remaining four in 1995. During that entire period, Sobel has been either intertwined with the Kay investigation and hearing or, since June 1996, directly under investigation by the FCC. It is not unreasonable for the Commission to defer action on applications before it when it is, at the same time, investigating questions concerning that applicant's conduct with respect to other matters before the agency. This is particularly true in light of the Commission's responsibility under the Communications Act to ensure applicants' qualifications before granting or renewing licenses. See, e.g., 47 U.S.C. 308. The motion fails to demonstrate that the Commission has abused its discretion in the circumstances of this case.

In addition, the proceedings in question here do not involve specific Congressional



timetables for action.<sup>1</sup> nor are issues of human health and welfare at stake. where the court has indicated that delays are less tolerable. Even in circumstances involving such issues, however, the court has recognized that agencies have substantial discretion in establishing regulatory priorities, which courts ordinarily should respect. See Action on Smoking & Health, 100 F.3d at 994-95; In re Barr Laboratories, Inc., 930 F.2d 72, 74 (D.C.Cir. 1991) ("respect for the autonomy and comparative institutional advantage of the executive branch has traditionally made courts slow to assume command over an agency choice of priorities"); Monroe Communications, 840 F.2d at 945-46. Moreover, while generally claiming that he is harmed by the delay, Sobel offers no specific explanation of the nature and extent of his claimed prejudice from the Commission not having acted on his applications to this point. Sobel has failed to show any injury at all, much less irreparable injury, that would warrant interference with the Commission's priorities -- particularly where, as here, it is involved in investigating possible misconduct by licensees.

"[T]his court has upheld in the strongest terms the discretion of regulatory agencies to control the disposition of their caseload." Nader v. FCC, 520 F.2d 182, 195 (D.C.Cir.1975) (citations omitted). The FCC enjoys express statutory authority to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." 47 U.S.C. 154(j); see Cellular Mobile Systems of Penn., Inc. v. FCC, 782 F.2d

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<sup>1</sup> The only remotely relevant statutory time period set out in the Communications Act is contained in 47 U.S.C. 155(d), which establishes as an "objective" the issuance of a final decision within six months of the close of the initial hearing in a licensing proceeding. The Court recognized in Monroe Communications that this statutory goal was not a mandatory requirement. In any event, no hearing has yet been designated with respect to Sobel, and any hearing that might be scheduled would not be an initial licensing hearing. More generally, the Court has held that even where statutes establish very specific requirements, an agency's failure to act within such statutory time limits is not, in itself, an abuse of discretion. See National Congress of Hispanic Am. Citizens (El Congreso) v. Marshall, 626 F.2d 882, 888 (D.C.Cir.1979).

182, 197 (D.C.Cir. 1985). See also Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 543-44, 98 S.Ct. 1197, 1211-12, 55 L.Ed.2d 460 (1978) ("administrative agencies 'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties' ") (quoting FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940)).

In the face of this strong policy, Sobel's meager showing is simply inadequate to meet the requirement that a mandamus petitioner demonstrate a clear and indisputable right to the relief requested. In addition, as we have noted, there is presently pending before the Commission a staff proposal that is directly responsive to the complaints set forth in the petition. We expect Commission action on that recommended action soon.

Conclusion

The petition fails to justify grant of the extraordinary remedy of mandamus in the circumstances present here. The petition should, accordingly, be denied.

Respectfully submitted,

*William E. Kennard/KGP*

William E. Kennard  
General Counsel

*Daniel M. Armstrong/KGP*

Daniel M. Armstrong  
Associate General Counsel

*C. Gray Pash, Jr.*

C. Gray Pash, Jr.  
Counsel

Federal Communications Commission  
Washington, D. C. 20554  
(202) 418-1740

January 27, 1997

FEDERAL COMMUNICATIONS COMMISSION  
Washington, D. C. 20554

OFFICE OF  
MANAGING DIRECTOR

April 28, 1997

Barry A. Friedman, Esq.  
Thompson, Hine & Flory, L.L.P.  
1920 N Street, N.W.  
Washington, D.C. 20036-1601

Dear Mr. Friedman:

This refers to your February 5, 1997 letter in which you advise this office of your belief that a violation of the Commission's ex parte rules occurred with respect to *James A. Kay, Jr.*, 11 FCC Rcd 6585 (Summary Decision 1996), *remanded for further proceedings*, FCC 971-06 (OGC Feb. 20, 1997).

The basis for your belief stems primarily from a statement contained in "Opposition to Petition for Writ of Mandamus" filed by the Commission with the United States Court of Appeals for the District of Columbia Circuit in *Marc D. Sobel, d/b/a/ Air Wave Communications* (Case No. 96-1361). You note that this pleading, which contains numerous references to James A. Kay, your client, and to Marc D. Sobel's relationship with Kay, specifically states that "the Commission currently has before it a staff recommendation for action directly responsive to Sobel's complaint." You maintain that given the similarities identified by the Commission with respect to the matters involving Kay and Sobel and Sobel's close relationship with Kay, the staff recommendation "must contain references to Kay and/or the pending proceeding involving Kay." You believe that a violation of the ex parte rules occurred by virtue of the fact that the staff recommendation was not supplied to Kay at the same time it was delivered to "decision-making personnel" of the Commission. Accordingly, you request a copy of the staff recommendation to the Commission and any other communications to the Commission concerning Kay and/or Sobel, as well as a determination that the Wireless Telecommunications Bureau violated the ex parte rules. Finally, you seek appropriate sanctions if a determination is made that the ex parte rules were violated.

The *James A. Kay, Jr.* proceeding is a restricted proceeding for ex parte purposes under Section 1.1208 of the Commission's Rules, 47 C.F.R. § 1.1208, and therefore, no ex parte presentations may be made. Because the Wireless Telecommunications Bureau is a party to that restricted proceeding, the Bureau is subject to that ex parte prohibition. We have reviewed the document prepared by the Wireless Telecommunications Bureau that you assert contains such prohibited presentations. The staff recommendation contains references to James A. Kay, your client, and notes the status of the adjudicatory proceeding. However, nothing in the document constitutes a "presentation" that goes to the merits or outcome of the matters at issue in the restricted proceeding. See Section 1.1202(a), 47 C.F.R. § 1.1202(a). Moreover, the ex parte rules do not restrict communications between decision-making and non-decision-making Commission personnel to the extent they are not presentations and are

otherwise necessary to carry out normally assigned functions with respect to matters other than restricted proceedings. *Rules Governing Ex Parte Communications in Hearing Proceedings*, 1 FCC 2d 49, 57 (1965). In view of the foregoing, we conclude that no ex parte violation occurred with respect to the *James A. Kay, Jr.* proceeding and that the relief you request is not warranted.

Sincerely,

A handwritten signature in black ink, appearing to read "Andrew S. Fishel". The signature is fluid and cursive, with the first name "Andrew" written in a larger, more prominent script than the last name "Fishel".

Andrew S. Fishel  
Managing Director

cc: W. Riley Hollingsworth, Esq.  
William H. Kellett, Esq.  
Gary Schonman, Esq.  
Anne Marie Wypijewski, Esq.  
Wireless Telecommunications Bureau